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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,

Cross-Petitioners,

vs.

SSC CORP.,

Cross-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can the market participant doctrine be applied with respect to a single element of an integrated program of solid waste flow control or must the principle be applied to the entire program of municipal regulation?

2. Did the Court below properly refuse to apply the market participant doctrine to regulatory provisions passed by a municipality that imposed criminal fines and jail terms for their violation?

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STATEMENT OF THE CASE

A. Preliminary Statement

Cross-Respondent SSC Corp. ("SSC") submits this brief with respect to the Cross-Petition for a Writ of Certiorari filed by the Town of Smithtown, its supervisor and its board ("Smithtown" or "the Town"). (The original Petition for Certiorari filed by SSC is docketed under No. 95-782).

SSC agrees with Smithtown with respect to one issue presented in the petition: namely that there is a logical inconsistency with respect to the holding of the Second Circuit on the two branches of its decision below: ". . . the analysis of the [Town] Code in the decision below is simultaneously inconsistent with the Court of Appeals' own reasoning with regard to the other aspect of this case, the Town's Solid Waste Collection and Improvement Contract . . . and with its holding in the companion case to this matter. [*USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995)]. See Cross-Petition at 5.

The Second Circuit held below that the Town of Smithtown was not a market participant in enacting and enforcing its flow control ordinance, which imposed criminal sanctions against solid waste haulers who did not use the designated facility: "To the extent that the flow control ordinance threatens garbage haulers with criminal fines and jail terms if they fail to do business with Smithtown at the Huntington incinerator, the town is engaging in market regulation, not market participation." (SSC Pet. for Cert., Dkt. No. 95-782, at 21a).

However, the Second Circuit also held that the Town *was* a market participant with respect to the other element of its flow control scheme, namely the Solid Waste Improvement contracts that were imposed upon solid waste haulers bidding to collect residential waste in Smithtown. These bidders were forced to utilize the

same facility designated in the criminal ordinances. The contract requirements were created for the same purposes as the criminal ordinances and are an integral part of the Town's flow control plan. Nevertheless, the Second Circuit held that while statutory flow control was unlawful, the contractual aspect of the plan could be upheld under a market participant rationale. As noted below, and as the Cross-Petitioners state, it is difficult to reconcile the Second Circuit's analysis in these two areas.

The entire thrust of the Cross-Petitioners' submission here is that local government has broad powers to provide for a comprehensive waste management program that is environmentally responsible. SSC has no quarrel with that proposition. SSC also agrees that any local government has considerable discretion in selecting different programs and personnel to accomplish that task. Thus a municipality may, if it chooses, use its own trucks, acquire its own landfills, and hire and utilize municipal employees, as some large cities do. Or it may utilize private haulers and provide for privately owned facilities to transfer or process solid waste. Or it may utilize a combination of such methods. And it may utilize criminal sanctions as part of an overall program.

But when local government engages in such activities through a broad integrated program of criminal penalties, new improvement districts governed by the local municipality, and by letting out contracts which explicitly reference and incorporate statutory flow control restrictions, the local government is clearly acting as a market regulator, not a market participant, with no more power than any other buyer or seller. Thus no component of the broad program can be isolated and compartmentalized in an effort to demonstrate that the government is only a market participant with respect to that single element.

Furthermore, the regulatory system established by the local government to accomplish its goal of

disposing of solid waste in an environmentally correct manner cannot violate specific prohibitions in the federal Constitution, in particular, the dormant Commerce Clause. The Court below correctly held that the Smithtown flow control Code provision at issue did constitute such a violation, following this Court's reasoning in *C & A Carbone v. Town of Clarkstown*, -- U.S.--, 114 S.Ct. 1677 (1994). The Second Circuit's conclusion on that aspect of the case is undoubtedly correct.

Smithtown spends considerable effort to distinguish *Carbone*. But its arguments cannot be accepted, as discussed in detail below. At bottom, the variations between the Smithtown code at issue here and the Clarkstown code examined in *Carbone* on which Smithtown relies (see Cross-Petition at 20) amount to a distinction without a difference. The arguments boil down to a claim that, unlike the town of Clarkstown in *Carbone*, Smithtown first established a monopoly of waste disposal services in the town, thereby insulating any of its later activities from Commerce Clause scrutiny.

But this Court did not hold in *Carbone* that a local government may evade the requirements of the Commerce Clause by first closing the market, that is, by passing a flow control provision that "prohibit[ed] private sales of disposal services" and by assuming responsibility for the "ultimate disposition of its waste." Cross-Petition at 20.

At bottom, the Smithtown code and the Smithtown improvement provisions were part of an integrated system for favoring an in-state designated facility, whose costs Smithtown had guaranteed and for which Smithtown had to find sufficient business to cover those costs, just as in *Carbone*. The result of the overall plan was that out-of-state entities were barred from bidding for "the processing service," as this Court stated in *Carbone*. "Out-of-state [companies] are deprived of access to local demand for their services. . . . The flow

control ordinance has the same design and effect [as other cases where local laws try to hoard a local resource]. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Carbone*, 114 S. Ct. at 1683. When such a government plan is put into operation, the Commerce Clause has been violated.

STATEMENT OF THE CASE

Statement of Facts

The crucial facts in this case have been conceded by Smithtown and the other cross-petitioners in their prior submission to this Court. In their Brief in Opposition to SSC's Petition for Certiorari in 95-782, Smithtown and its officials admit that the Code Provision at issue here was passed at the same time and for the same purposes as the creation of the Improvement district and the letting of contracts. As the Cross-Petitioners stated (Brief in Opposition, 95-782, at 1):

> Two independent municipal actions were undertaken by the Town in 1991-92 to manage its solid waste. It passed a local law (the Code) under its police power, mandating that all waste generated in the Town, including waste collected under private arrangements from commercial sources and institutions, be delivered to Town designated facilities. Then it separately created, through its taxing power, a special district comprised of identified residential properties . . . to which it assessed charges and provided comprehensive collection and disposal service.

Both of these plans were accomplished at the same time and for the same purpose, as Smithtown concedes. In December, 1991, as part of its Solid Waste Management Plan, Smithtown enacted a flow control ordinance (See Second Circuit Joint Appendix, A493 et

seq.) This "flow control" law, constituting Sect. 177-83.C and D(1) of the Smithtown Town Code, provided:

> C. All commercial solid waste collected [in the Town] shall be delivered directly to the designated disposal facility.
>
> D. . .
>
> (1) Commercially acceptable wastes collected by the carter *shall be delivered* to the Huntington Resource Recovery Facility for disposal. The tipping fee at this facility shall be . . . $65 per ton commencing on January 1, 1992. (emphasis added)(A545, 137).

Exhibit Volume to Second Circuit Appeal at A-545.

Violations of the Town's flow control ordinance are punishable by both civil and criminal penalties. Section 177-102 of the Smithtown Town Code provides that any person violating the Town's flow control law "shall be guilty of an unclassified misdemeanor and shall be liable to a fine of not more than five thousand dollars ($5,000.) or imprisonment for not more than sixty (60) days, or both." (A549, 550).

At precisely the same time and for precisely the same reasons, the Town created the Improvement District, under which the Town was divided into ten residential districts. The Town then solicited competitive bids for waste collection services in each district. As the Second Circuit pointed out, a standard contract was imposed upon the successful bidders, "which required them to dispose of residential garbage at the Huntington incinerator." (SSC Cert. Pet. 95-872 at 10a). *Those contracts contained precisely the same requirements for residential waste as the flow control law contained for commercial waste.*

The contracts provided in pertinent part:

SECTION 1.04 - DISPOSAL OF SOLID WASTE

> A. 1. - All residential solid waste collected by the Contractor under the terms of this Contract shall be transported to and disposed of at solid waste management facilities which are or may be designated by the Town of Smithtown during the term of this Contract.
>
> B. 2. - All household garbage/refuse collected by the contractor shall be delivered to the Huntington Resource Recovery Facility for disposal.

Exhibit Volume to Second Circuit Appeal at A-545.

The purpose of both the Code and the Contract was to insure that the Huntington facility secured enough business to pay for operating costs and debt service for the Huntington resource facility so that the Town would not have to cover any shortfall in revenues. See Second Circuit decision, SSC Cert. Pet. 95-782, at 8a. The Second Circuit explained: "To ensure a steady flow of garbage to the Huntington incinerator (and thus to ensure a steady flow of tipping fees), Smithtown enacted a 'flow control' ordinance in 1991. . ." SSC Cert. Pet. at 9a.

REASONS FOR DENYING THE TOWN'S PETITION FOR A WRIT OF CERTIORARI

I.

UNDER THE *CARBONE* CASE, THE SMITHTOWN CODE VIOLATES THE COMMERCE CLAUSE

A. The Smithtown Actions Must Be Examined in Combination and Cannot Be Separately Analyzed.

At the heart of Smithtown's argument in its Cross-Petition is that each of Smithtown's steps in regulating solid waste disposal must be separated and insulated from each other. Smithtown constantly tries to ignore the fact that all of the governmental steps were taken at the same time and for the same purpose, namely to insure that all solid waste (both commercial and residential) must be taken to the Huntington facility to "ensure a steady flow of tipping fees" to pay for operating costs and debt service to the owner.

Nevertheless, Smithtown argues that each step must be examined in isolation. Thus in the Cross-petition, Smithtown claims:

> Smithtown's waste management program encompassed two separate acts. The assumption of the responsibility for waste disposal by *prohibiting* the private sale of disposal services constituted regulation of the disposal market. However, the *purchase* of disposal services from its neighbor's waste-to-energy facility constituted market participation.

Cross-Petition at 5. (emphasis in original).

It is on this myopic basis that Smithtown urges this Court to ignore its holding in *Carbone* that governmental acts that hoard local resources, favor local

processors and bar out-of-state bidders for the "processing services" constitute a *per se* violation of the Commerce Clause.

There is no question but that Smithtown's acts (both the Code and the Contract) deprived foreign processors "of access to local demand for their services." Nevertheless, Smithtown claims that it was freed from the requirements of the Commerce Clause since, after it had closed the market to all private entities, it became a "market participant" to whom Article I, Sect. 8, Cl. 3 does not apply. Smithtown argues that the Second Circuit was required "to address these separate acts individually." Cross-Petition at 6.

Merely to state that proposition is to show its unacceptability. It is a cardinal principle of Constitutional law and of Commerce Clause jurisprudence in particular that a Court must look to the reality of what a government does and not to the form. This Court explained recently in *West Lynn Creamery, Inc. v. Healy*, 114 S.Ct. 2205 (1994) that a court cannot separate, insulate and analyze only one part of an integrated commerce-regulating scheme.

> Respondent's argument would require us to analyze separately two parts of an integrated regulation . . . It is the *entire program* . . . . that simultaneously burdens interstate commerce and discriminates in favor of local producers. The choice of constitutional means [for each constituent part of the program] . . . . cannot guarantee the constitutionality of the program as a whole. (emphasis added)

114 S. Ct. at 2215.

Since Smithtown's entire argument is based upon its assertion that, contrary to this Court's holding in *West Lynn Creamery*, the Second Circuit was required "to address these separate acts individually." Cross-Petition at 6, its claims must be rejected.

B. *Carbone* Applies in This Case and Requires Invalidation of the Smithtown Ordinance.

Applying these principles, it is clear that the "program as a whole" discriminates against interstate commerce in precisely the same way that the Clarkstown law (examined in *Carbone*) did. In *Carbone*, this Court struck down a local solid waste flow control law as a *per se* violation of the Commerce Clause. "We consider a so-called flow control ordinance, which requires all solid waste to be processed at a designated transfer station before leaving the municipality", *Id.*, 114 S. Ct. at 1680. Writing for the majority, Justice Kennedy concluded that because the ordinance attains its goal "by depriving competitors, including out-of-state firms, of access to a local market, we hold that the flow control ordinance violates the Commerce Clause." *Id.*

The essential vice of flow control is that it drives up the cost of solid waste disposal by denying out-of-state landfills access to local markets. As Justice Kennedy explained:

> Furthermore, even as to waste originating in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause.

114 S.Ct. at 1681.

Justice Kennedy continued:

> With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. . . . The essential

> vice in laws of this sort is that they bar the import of the processing service. Out-of-state [companies] are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource--be it meat, shrimp, or milk--for the benefit of local businesses that treat it. The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.

114 S.Ct. at 1682-3.

The Second Circuit properly held that those provisions of the Smithtown ordinance which enforce the flow control requirements though threat of criminal sanctions was barred by *Carbone*. The Court noted (SSC Cert. Pet., Docket No. 95-872, at 21a):

> To the extent that the flow control ordinance threatens garbage haulers with criminal fines and jail terms if they fail to do business with Smithtown at the Huntington incinerator, the town is engaging in market regulation, not market participation. . . .
>
> No private company in the open market could force others to buy its services under pain of criminal penalties.

The Court correctly explained the requirements for "market participant" status:

> A state's actions constitute "market participation" only if a private party could have engaged in the same actions.

Id. at 22a.

Comparing the Smithtown provision to a municipally-owned landfill examined by the Third

Circuit in *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir.1989), *cert. denied*, 493 U.S. 1077 (1990), the Second Circuit noted (*Id.* at 22a-23a):

> If Smithtown merely used favorable rates to entice town residents to use the local incinerator, it would be acting as a market participant as in *Swin*. The difference between the Smithtown ordinance and the arrangement challenged in *Swin*, however, is that Smithtown has established criminal penalties that effectively compel parties to buy services there. We agree with the Third Circuit that
>
> > [w]hen a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market.
>
> *Atlantic Coast*, [*Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 717 (3d Cir.1995)] 48 F.3d at 717. Thus, we conclude that Smithtown's flow control ordinance constitutes a "regulation" of the waste disposal market, rather than participation in that market.

Smithtown argues that because Smithtown passed one additional law that the town of Clarkstown did not pass, it can accomplish its goal of closing its markets from out-of-state processing competition. That additional law was its initial act of monopolizing the local market for disposal services through the creation of districts with the authority to let refuse collection contracts. Once it took that additional step, monopolized the market, and became the only

purchaser of disposal services, it claims that it was freed from the requirements of *Carbone*.

Thus Smithtown argues that unlike the situation here, "Clarkstown . . did not eliminate the private market for waste disposal services." Cross-Petition at 20. By contrast, Smithtown did eliminate such a market. It claims that it then "purchased disposal capacity from Huntington and Ogden outright, without contingencies." *Id*. at 21. It argues that having purchased all disposal "services" from Ogden, it then acted as a market participant in selling those services to the haulers. "There is no forced private transactions because the government stands in the middle." *Id*.

This kind of sophistry cannot be accepted as a principle of Commerce Clause jurisprudence. It would give local governments the power to evade the requirements of the Commerce Clause simply by passing fictitious provisions to monopolize the market as a first step in favoring a local processor. Presumably, if Smithtown's position were accepted by this Court, Clarkstown could reexamine its current legal position and simply pass a new provision, establishing a monopoly in waste collection services in the town. That is, it could assume "responsibility for waste disposal by *prohibiting* the private sale of disposal services." It could simply declare that all private haulers collecting waste in Clarkstown were acting as agents for the Town, as Smithtown argues here. It could then "purchase" all waste disposal services from the favored facility. At that point, it could do what this Court held was prohibited by the Commerce Clause, that is, require all collectors and haulers to utilize the services of the favored facility.

The economic and political reality is that towns such as Clarkstown and Smithtown have placed their own credit on the line to fund and support large incinerators. They must guarantee a steady source of supply and a steady flow of tipping fees to do so. They use their governmental power to mandate that such facilities be used by persons collecting solid waste within

their towns. But such a justification does not meet the requirements of the Commerce Clause, as this Court held in *Carbone*: ". . . the flow control ordinance is a financing measure. By itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce." 114 S. Ct. at 1684.

It is impossible to accept any facile evasion of this Court's decisions through such an obvious subterfuge as that suggested here by Smithtown.

II.

THE SECOND CIRCUIT'S DECISION IMPROPERLY FAILED TO EXAMINE THE SMITHTOWN PROGRAM AS A WHOLE AND TO DETERMINE WHETHER THE MARKET PARTICIPANT DOCTRINE CAN BE APPLIED TO IT

The key issue raised by the Second Circuit decision is whether the market participant doctrine can be applied in an integrated program for waste collection and disposal services when governmental regulatory power first clears the market of all private participation.

It is SSC's position that the market participant doctrine can be applied only when, as the Second Circuit held below, "a private party could have engaged in the same actions." (SSC Cert. Pet. 95-782 at 22a). Since no private party could have first cleared the market of all other participants by governmental decree, a town cannot claim the benefits of that doctrine when it engages in such monopolistic foreclosure as the initial step in its entry into the market. As the Third Circuit has also pointed out, once a municipality uses "its regulatory power to control the actions of others in that market," in cannot take advantage of the market participant doctrine, *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 717 (3d Cir.1995).

This Court has always emphasized this point in all its market participant cases. It has noted that "the Commerce Clause responds principally to state . . . regulatory measures impeding free private trade in the national marketplace." This Court added: "There is no indication of a constitutional plan to limit the ability of the States themselves *to operate freely in the free market*." *Reeves, Inc. v. Stake*, 447 U.S. 436-37, 429, 439 (1980)(emphasis added).

But there is no "free market" here because the government has initially closed the market to all outside participants. Such a device does not insulate later laws passed to enforce the initial closure (as the Second Circuit correctly held), nor should it insulate an examination of later contracts imposed on the private haulers once the market has been closed.

It is no answer to say that a town is fulfilling a governmental duty when it provides garbage collection or disposal services as the Second Circuit held in the companion case of *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1995). New York municipalities have a duty to ensure proper collection and disposal of trash for the well-being and health of the community. *Nehbras v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 194-95, 159 N.Y.S.2d 145, 140 N.E.2d 241 (1957); 1979 N.Y.Op.Att'y Gen. (Informal) 237 ("Generally, the removal of garbage is an affirmative duty properly delegated to and imposed upon municipalities.").

To fulfill this duty, a municipality may perform the function of removal directly through its own department; or it may have it performed under a public contract; or it may require a license to be obtained by persons or firms authorized and qualified to perform that function. It is for the municipality, within reasonable bounds, to determine how solid waste will be collected and removed, or rendered harmless. *P. & A.*

Carting Co. v. City of New York, 7 Misc.2d 815, 817, 158 N.Y.S.2d 296 (Sup.Ct., Special Term, N.Y.County 1956).

But once this responsibility is established through governmental *regulation*, it is impossible and logically inconsistent to label this government conduct as market participation. The latter doctrine assumes that the government is acting only in a proprietary, and not governmental, capacity.

Once the Town of Smithtown declared and imposed its total monopoly control over residential solid waste collection and disposal services, it foreclosed any application of the market participant doctrine.

CONCLUSION

The Second Circuit correctly held that the market participant doctrine could not be applied to laws that regulate the solid waste market through imposition of criminal penalties. It is the anomalous position that a contract which seeks the same ends is not violative of the Commerce Clause that should be examined by this Court in Dkt. No. 95-782.

Respectfully submitted,

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